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No. 90-1631

# In the Supreme Court of the United States

OCTOBER TERM, 1990

MURRAY WILSON AND SAM WATENSTEIN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners' Sixth Amendment right to compulsory process was violated by the district court's failure to execute bench warrants for defense witnesses.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but the decision is noted at 924 F.2d 1064 (Table).

### JURISDICTION

The judgment of the court of appeals was filed on January 29, 1991. The petition for certiorari was filed on April 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of con-

spiracy to commit wire fraud and mail fraud, in violation of 18 U.S.C. 371; wire fraud, in violation of 18 U.S.C. 1343; and mail fraud, in violation of 18 U.S.C. 1341. Wilson was sentenced to three years' imprisonment, to be followed by five years' supervised release, and fined $10,000. Watenstein was sentenced to 18 months' imprisonment, to be followed by five years' probation. The court of appeals affirmed. Pet. App. 1a-11a.

1. The evidence at trial showed that petitioners defrauded the Dunes Hotel and Country Club in Las Vegas by manipulating the hotel's credit policies. In 1983, Wilson recommended individuals to the Dunes for credit and arranged for them to travel to Las Vegas. Upon their arrival in Las Vegas, the individuals used their credit to buy gambling chips at the Dunes. After gambling with a portion of the chips, they delivered the balance to petitioners, who then gave the chips to someone else to cash. The loans represented by the chips were never repaid. Pet. App. 2a.

2. Zvi Hagar, one of the government's principal witnesses at trial, testified that he made three trips to Las Vegas at petitioners' behest and that he cashed approximately $750,000 in gambling chips on those trips. Hagar admitted at trial that he wanted to take revenge on petitioners for an incident in New Jersey in 1985 during which Hagar claimed that petitioners beat him and left him naked on the side of the road. Hagar also admitted that he had told Wilson that he would not testify if Wilson paid him $30,000. Pet. App. 2a-3a.

At the start of trial, petitioners' counsel informed the court that petitioners had subpoenaed Rabbi Solomon Hagar and Baruch Hagar, Zvi Hagar's father and brother, to testify at trial, but that they had not appeared. Petitioners asked the court to issue arrest warrants for both individuals, and the court complied. Pet. App. 3a; Gov't C.A. Br. 9. On the fourth day of trial, defense counsel asked if the

arrest warrants had been forwarded to New York where the Hagars resided. The court stated that it did not know if the warrants had been forwarded and asked petitioner Watenstein's counsel to check on their status. Gov't C.A. Br. 11. Watenstein's counsel agreed to check on the situation and inform the court if there were any problems. Pet. App. 3a; Gov't C.A. Br. 11.

Almost a week later, on the final day of trial, Solomon and Baruch Hagar still had not appeared. The district court offered to continue the trial until the arrest warrants were executed. Petitioners declined the offer of a continuance and instead rested their case. Later that day, however, petitioners moved for a continuance or, in the alternative, for a missing witness instruction. Watenstein's counsel told the court that he had learned from the United States Marshals Service that it had done nothing to execute the warrants because the Marshals Service believed that executing the warrants was the FBI's responsibility. The district court concluded that the Hagars' testimony would be irrelevant or cumulative. Accordingly, it denied petitioners' requests for a continuance or a missing witness instruction. Pet. App. 3a-4a; Gov't C.A. Br. 11-12.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioners' claim that their Sixth Amendment rights had been violated by the district court's refusal to grant a continuance to secure the appearance of Solomon and Baruch Hagar at trial. Although the court was "troubled by the fact that the bench warrants were never executed in this case," it held that the district court had not abused its discretion by denying the continuance because petitioners "clearly failed to use due diligence in obtaining the Hagars' presence." *Id.* at 4a-5a. The court noted that petitioners "assumed the burden of keeping the court informed of any problems with the warrants and failed to do so" and that petitioners "should have pressed for execution of the

warrants days earlier." *Id.* at 5a. Finally, the court observed that petitioners chose to rest their case when the district court offered to grant a continuance. *Ibid.*

## ARGUMENT

Petitioners contend (Pet. 10-16) that their Sixth Amendment rights were violated by the failure to execute the bench warrants and obtain the Hagars' appearance at trial. This fact-bound claim warrants no further review.

The Sixth Amendment's Compulsory Process Clause gives "criminal defendants * * * the right to the government's assistance in compelling the attendance of favorable witnesses at trial." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 56 (1987). The right to compulsory process "is dependent entirely on the defendant's initiative." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). Indeed, "[t]he very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." *Ibid.* Moreover, this Court has recognized that the Compulsory Process Clause "is a weapon that cannot be used irresponsibly," *ibid.*, and that "[i]n the exercise of [the right to present witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence." *Id.* at 411 n.15 (quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973)). It follows that the right to compulsory process, like other constitutional rights, may be waived if it is not asserted. See, *e.g.*, *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) (defendants forfeited right to be present at conference with juror by not asking to be present); *Levine* v. *United States*, 362 U.S. 610 (1960) (defendant forfeited any due process right to a public trial by not asking the district court to open the courtroom).

In this case, petitioners failed to discharge the duty of affirmative conduct imposed by the Compulsory Process

Clause. Petitioners informed the court, through counsel, that they would check to make sure the arrest warrants had been executed and would inform the court if any problem arose. Petitioners then failed to investigate in a timely fashion. They waited almost a week, until the last day of trial, to inform the court that the warrants had not been executed. Moreover, petitioners' decision to reject the district court's offer of a continuance and rest their case waived their rights under the Compulsory Process Clause.

Even if petitioners had preserved their right to complain about the government's failure to execute the arrest warrants, that claim would lack merit. This Court has made clear that "more than the mere absence of testimony is necessary to establish a violation of the right" to compulsory process. *United States* v. *Valenzuela-Bernal*, 458 U.S 858, 867 (1982). A defendant must show that witnesses whose presence he has been unable to obtain "would have been both material and favorable to his defense." *Ibid.* See also *Washington* v. *Texas*, 388 U.S. 14, 16 (1967) (testimony must be "relevant and material, and * * * vital to the defense").

Here, the district court concluded that the Hagars' testimony would have been irrelevant or cumulative. Zvi Hagar's bias against petitioners was fully brought out at trial. Thus, to the extent that petitioners sought to impeach Zvi Hagar's testimony through his brother and father, the district court reasonably concluded that Solomon and Baruch Hagar's testimony would have been cumulative. Petitioners assert (Pet. 4) that they sought to show that the Hagars had attempted to extort money from them in the past, and had conspired to frame petitioners for the offenses charged in the indictment. But petitioners made no showing that the Hagars would have so testified. The district court was therefore correct in concluding that the absence

of the Hagars as witnesses at trial did not prejudice petitioners' defense.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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